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Supreme Court of the United States.

OCTOBER TERM, 1967.

No. 13 275

STEPHEN R. WAINWRIGHT,
Petitioner,

v.

CITY OF NEW ORLEANS,
STATE OF LOUISIANA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF LOUISIANA.

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Supreme Court of the United States.

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CITY OF NEW ORLEANS,
STATE OF LOUISIANA,
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PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF LOUISIANA.

Stephen R. Wainwright prays that a writ of certiorari issue to review the judgment of the Supreme Court of Louisiana entered in the above-entitled case on March 24, 1966.

Citations to Opinions Below.

The ruling and judgment of the Criminal District Court, Parish of Orleans, State of Louisiana, are unreported and are printed in Appendix B hereto, *infra*, p. 22.

The opinion of the Supreme Court of Louisiana, printed in Appendix B hereto, *infra*, p. 49, is reported in 184 So. 2d 23.

Jurisdiction.

The judgment of the Municipal Court of New Orleans was rendered on July 16, 1965. A timely appeal was filed in the Criminal District Court, Parish of Orleans, and judgment thereon was rendered on March 2, 1966. A timely application for writs of certiorari, prohibition and mandamus was filed with the Supreme Court of Louisiana on March 15, 1966. This application for writs was denied and the judgment of the Criminal District Court affirmed on March 24, 1966. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257 (3).

Questions Presented.

I.

When a person is stopped on the sidewalk by the police "on suspicion" and questioned, to what extent must the person coöperate? Must he answer all questions? If he has no identification, must he strip to his undershirt on the sidewalk and let the police inspect him for identifying marks, or is this an unreasonable search?

II.

When this person, without identification, is mistaken for a wanted man, and he tells the police his name, address and occupation, but refuses to remove any of his clothing, can he legally be arrested "on suspicion," charged with vagrancy and taken to jail for further investigation, or is this a denial of due process?

III.

When this person arrives in the police station, does he have the right immediately to call his lawyer to prove his identity, or does he first have to submit to the removal of

some of his clothing, to the inspection of his body for identifying marks, and to being booked?

IV.

When this person refuses, because he suffers from an unsightly skin disease, to remove his clothing and submit to this examination for identifying marks, before being allowed to call counsel to prove his identity, and the officers use force to remove his clothing, is this an unreasonable search which the person may resist?

V.

When this person resists the inspection of his body by merely folding his arms across his chest in trying to keep his clothing on, and he is convicted of the crime of disturbing the peace by assault for these actions, is this a denial of due process, in that there was a total lack of evidence of the elements of disturbing the peace by assault?

Statutes.

Code of the City of New Orleans.

Section 42-24. Disturbing Public Peace.

No person shall disturb the public peace by assaulting or beating another or by threatening to do bodily harm to another. (C.C.S., Ord. No. 7637, §1; C.C.S., Ord. No. 7809, §1.)

Section 49-1. What Constitutes Resisting an Officer.

Resisting an officer is the intentional opposition, resistance to, or obstruction of, an individual acting in his official capacity and authorized by law to make lawful arrest or seizure of property or to serve any lawful process or court order, when the offender knows or has reason to know that the person arresting, seizing property or serving proc-

ess is acting in his official capacity. (C.C.S., Ord. No. 18,142, §1.)

SECTION 49-2. RESISTANCE UNLAWFUL.

It shall be unlawful for any person, by word or action, to resist an officer, or to incite, induce, suggest or otherwise persuade or attempt to persuade any person to resist an officer. (C.C.S., Ord. No. 18,142, §2.)

THE CONSTITUTION OF THE UNITED STATES OF AMERICA.

AMENDMENT IV.

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

AMENDMENT VI.

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defence.

Statement.

On the afternoon of October 12, 1964, the defendant, Stephen R. Wainwright, went to see Doctor W. Kohlmann

Reed, a New Orleans dermatologist, regarding an unsightly skin disease on his arms and chest. He began treatment on that day and was told to return the following week.

Early the following morning, October 13, shortly after midnight, the defendant left his French Quarter apartment and walked down Bourbon Street to go to a diner. Some three blocks from his apartment the defendant was stopped by two police officers in a patrol car. The men, officers Boepple and Ottesen, questioned him on the sidewalk. He told the officers that he was on his way to get something to eat, that his name was Stephen Wainwright, that his address was 829 Ursuline Street, and that he was a student at Tulane University. The police then asked for his identification. The defendant had inadvertently left his identification in his apartment some three blocks away, and he so informed the officers. The defendant was then told to remove his summer jacket so that the officers could make sure that the defendant was not the person they were looking for. The jacket had a zipper front and was tight at the wrists. The defendant, clad only in an undershirt under the jacket, refused to disrobe on the street. The police then tried to talk the defendant into taking his jacket off. The defendant continued to refuse to remove it, but offered instead to go to his apartment to get his identification, and have his roommate, a New Orleans lawyer, identify him. The police declined this idea as contrary to police procedure and insisted that they had a right to examine the defendant on the street for identifying marks. The defendant insisted that they did not have any such right. The disagreement became more heated and the parties argued for some time. Finally the defendant told the police to either let him get his identification or let him go. They refused. The defendant told them to stop molesting him and started to walk away. They

stopped him and at this time ordered him to remove his coat. He refused, so they informed him that he was being placed under arrest. The defendant asked the charge and was informed that he was being placed under arrest for vagrancy by loitering. The officers put the defendant into the patrol car and started for the police station. The defendant asked the police to stop at his apartment on the way, to talk to his lawyer, but they refused, and turned off before they got to Ursuline Street. When the defendant told the police that refusing all his requests was stupid, the officers stopped the car and informed the defendant that they were also charging him with reviling the police. When the car arrived at the station the officers took the defendant inside. The first thing the defendant did was to ask to use the phone to call his lawyer to identify him. This request was summarily denied, and the defendant was placed in an interrogation room with the two arresting officers, Boepple and Ottesen.

Officer John Ottesen: A. When we brought him to the station we brought him into the Interrogation Room; questioned him as to his name, place of birth, etc.

Attorney Dan A. Spencer: Q. Did he answer these questions?

A. He answered his name; where he lived, and said he was a law student. He didn't want to tell us any other information.

Q. Did he ask to use the telephone?

A. I don't know.

Q. You don't recall whether or not he asked you?

A. I don't remember.

Court: He may have?

Officer John Ottesen: It's possible.

Attorney Dan A. Spencer to Officer John Ottesen:
Q. How long was he in the Interrogation Room?
A. Ten or fifteen minutes, and we telephoned for the Lieutenant.
Q. Where was he?
A. Out in the car.

Transcript, p. 36.

Attorney Dan A. Spencer: Q. What happened when Lt. Martello arrived?
Officer John Ottesen: A. The Lieutenant asked him a few questions; he said his name; where he lived; and that he was a law student.

Transcript, p. 37.

Court: Subsequent to the calls to Lt. Martello and the Detectives' office, what did you do, Officer Ottesen?
Officer John Ottesen: Lt. Martello arrived and he questioned Wainwright, and wanted Mr. Wainwright to remove his jacket, because this was a vital incident in his identification, as to whether he was Johnnie McTaylor or not.
Attorney Dan A. Spencer to Officer John Ottesen:
Q. Did you ever search Mr. Wainwright?
A. Yes, when we first interrogated the suspect.
Q. Did he have any weapons on him?
A. No.

Transcript, p. 38.

Lt. Francis Martello: A. I asked him to remove his jacket.
Attorney Dan A. Spencer: Q. This was in the Desk Sergeant's office?
A. Yes.
Q. What did he say then?

A. He demanded the right to use the telephone. He said he wasn't going to remove his jacket. I told him he has a right to use the 'phone. I said all right, we will book you first. He wanted to use the telephone. I told him you have to be booked before you can use the telephone. I told him he had to be searched before he could use the telephone. This is what he objected to.

Transcript, p. 13.

Court: Were you searching for weapons or marks?

Lt. Francis Martello: A. To determine whether or not he had a mark on his arm.

Transcript, p. 15.

Attorney Dan A. Spencer: Q. He did ask to use the telephone before he was searched?

Lt. Francis Martello: A. Yes. I told him no he had to be booked and searched first.

Transcript, p. 16.

The defendant refused to the end to remove his coat, even when assaulted and beaten by the officers.

Attorney Dan A. Spencer: Q. You testified that Mr. Wainwright crouched in a corner, held his jacket to him, now what did he do when Officers O'Rourke and Gilford tried to remove it?

Lt. Francis Martello: A. He tried to keep it on by holding it.

Q. How?

A. By folding his arms. (demonstrates)

Q. He didn't do anything else?

A. No, not to my knowledge.

Transcript, p. 16.

At last the defendant was beaten into submission and the coat ripped from his body. He was booked and charged with vagrancy, reviling the police and resisting arrest, and then he was allowed to call his roommate Attorney Dan Spencer, and told him of his plight. As soon as the defendant hung up the phone the officers took him across the City of New Orleans, and placed him in a basement cell, where he was refused medical attention and where his lawyer could not reach him. When Attorney Spencer arrived at the station to see the defendant, the police informed him that the defendant was not there. The lawyer demanded the right to see his client. The police ordered him from the station. When the young lawyer insisted on seeing the defendant immediately, the police arrested him for vagrancy by refusing to move on.

At 4:30 a.m. the defendant was finally released by the police and immediately went with his lawyer, who had since been released, to a hospital for emergency treatment of his injuries. At 10 p.m. that night the defendant and his lawyer were arraigned and the trial date was set for December 4, 1964. On that date the Municipal Court of New Orleans convicted the defendant's lawyer of vagrancy, which conviction was later reversed on appeal. On that same date, December 4th, the defendant's case, which was originally #80503B, was also begun in Municipal Court before Judge Bucaro, and evidence heard. In his behalf the defendant introduced into evidence testimony by the Dean of the Tulane Law School, Cecil Morgan, Professor Lowell Turrentine of the Law School, and Attorney Cuthbert Baldwin of New Orleans.

Judge Bucaro, however, after learning that the defendant had given a written statement to the New Orleans District Attorney's Office accusing the officers of brutality and false arrest, and that the defendant intended to file a civil action against the officers involved, refused to hear

any more evidence in the case and continued it indefinitely over the objection of the defendant.

No further hearings were held on this case until more than five months later, on May 7, 1965, at which time Judge Bucaro heard only a part of the evidence, and then, over the objection of the defendant, again continued the case, this time to May 14, 1965. These continuances were a hardship to both the defendant and his counsel, since the defendant was in the midst of taking final exams at Tulane Law School and since the defendant's lawyer had to come from Shreveport, Louisiana, for each appearance. Therefore an application for writs of certiorari, prohibition and mandamus was filed in the Criminal District Court, Parish of Orleans, to prevent any further unfounded delays by Judge Bucaro. (See Appendix B, page 22.) The application was denied on May 13, 1965. (See Appendix B, p. 31.)

On May 14, 1965, the case was again heard. In order to accommodate two physicians who were present in court, they were allowed to testify first in behalf of the defendant. Doctor W. Kohlmann Reed, the New Orleans dermatologist who treated the defendant the day before his arrest, explained the defendant's skin disease to the court. Doctor Richard M. Levy testified as to the beating for which he treated the defendant immediately after his release from jail.

At the termination of the government's evidence the defendant moved for a directed verdict. Judge Bucaro took this motion under advisement. The judge then had a short conference with the prosecuting attorney and, as a result of this conversation, more complaints were immediately brought, to wit, resisting arrest and two counts of disturbing the peace. These offenses were alleged to have occurred on the same night as the three others, October 13, 1964, seven months before. #83469A was assigned to this

new element in the case, and the defendant was immediately arraigned. All the witnesses necessary to try this case were present in court, and the defendant therefore insisted on immediate trial of these additional complaints, and insisted that the judge make a decision on his motion for directed verdict with respect to the original charges. Judge Bucaro both refused to decide the motion for directed verdict and refused to hear the complaints, and again continued the case, this time to May 21st. On May 17th, however, the defendant was advised that the case would not be heard on the 21st, but, instead, Judge Bucaro was having it continued again, this time to the 16th day of July, 1965. This continuance, the judge knew, necessitated the defendant's travelling 3,000 miles in order to be present for trial, since he was to graduate in June and return home to Massachusetts.

On July 16, 1965, the parties appeared in court, but Judge Bucaro still refused to take any action on the motion for directed verdict with respect to the first half of the case, to wit, the original complaints of October 13, 1964. He found the defendant guilty of the second half of the case, to wit, the additional complaints which had been brought on May 14, 1965. These convictions were duly appealed to the Criminal District Court for the Parish of Orleans.

A stenographic transcript was made of the hearings on December 4, 1964, May 7, 1965, May 14, 1965, and July 16, 1965. However, the transcript of the evidence taken on December 4, 1964, May 7 and May 14, 1965, was never made a part of the record to be heard on the appeal, although request for the same was duly made by the attorney for the defendant. In the record tendered by the City of New Orleans to the Criminal District Court, only the prosecution's side of the case was presented. That part of the transcript, #80503B, containing all the defendant's wit-

nesses, was not included, so that the Criminal District Court had no opportunity to make a sound decision on the record.

In his assignment of error to the Criminal District Court the defendant argued the following:

ERROR.

The arrest in question was illegal in that there was no evidence of probable cause for the defendant to have been legally arrested for vagrancy or any other crime. (Appendix B, pp. 37, 38.)

RULING.

"Under the circumstances, the arrest was legal. . . . Considering all of the facts and circumstances, the police were justified and had reasonable cause to arrest the defendant." (Appendix B, p. 42.)

ERROR.

There was a total lack of evidence of the defendant's having assaulted a police officer. (Appendix B, p. 38.)

RULING.

"The defendant then folded his arms, and crouched and buffeted the officers in their efforts to remove the jacket." (Appendix B, p. 43.)

ERROR.

The search was unreasonable and the defendant had the right to use such force as might be necessary to resist it. (Appendix B, p. 37.)

RULING.

"For the purpose of identification, the police had a right to examine defendant's arm. . . . To hold that the

police in circumstances such as this cannot make a reasonable search and examination of an individual in lawful police custody, and that an individual can violently oppose the action of the police in doing their duty, would be to unduly hamper the police." (Appendix B, pp. 44-46.)

ERROR.

The defendant was denied his right to counsel. (Appendix B, p. 38.)

RULING.

"Of course the constitutional rights of the individual should be protected, but in our zeal to safeguard those rights, we must not be unmindful of the public interest involved and we should not erect any unnecessary barriers that will thwart the law enforcement officers in the performance of their duties to investigate, detect and secure evidence of crime." (Appendix B, p. 46.)

On March 2, 1966, judgment was rendered by the judge of the Criminal District Court reversing the defendant's convictions of violation of the Code of the City of New Orleans, section 49-2, relative to resisting an officer. (See Appendix A, p. 22.) The conviction was affirmed on the complaints alleging disturbing the peace by assaulting an officer. (See Appendix A, p. 22.)

On March 15, 1966, a timely application for writs was filed in the Supreme Court of Louisiana. The defendant listed therein the following assignment of error (Appendix B, p. 48):

"ASSIGNMENT OF ERROR.

"The defendant assigns as error on the part of the Criminal District Court of the Parish of Orleans, the following, viz:—

"(1) There was insufficient evidence as a matter of law to find that the defendant committed an assault on anyone.

"(2) There was insufficient evidence as a matter of law to justify a finding that the defendant committed a breach of the public peace.

"(3) The defendant was denied his constitutional right to due process in that:

"(a) The defendant was denied his right to have counsel present from the moment of his arrest.

"(b) The defendant was deprived of his right not to be subject to unlawful search.

"(c) The defendant was deprived of his right to a speedy trial.

"(d) The defendant was deprived of his right to an impartial trial."

On March 24, 1966, the Supreme Court of Louisiana denied the application of writs and affirmed the lower court judgment. (Appendix B, p. 49.)

The crime for which the defendant now stands convicted is violation of section 42-24 of the Code of the City of New Orleans, which provides as follows: "DISTURBING PUBLIC PEACE: No person shall disturb the public peace by assaulting or beating another or by threatening to do bodily harm to another." (See Appendix A, p. 33.)

The foregoing statements of fact, insofar as they do not appear in the judgment of the Criminal District Court, are a part of the record of the first half of the case in the Municipal Court of the City of New Orleans, #80503B. It will be impossible for this Court to make a full determination of the extent to which the rights of the defendant have been violated without this Court's having the complete record of this case, including the Municipal Court case #80503B. Therefore, the defendant at this time respect-

fully requests that the record in case #80503B, New Orleans Municipal Court, be, by order of this Court, made a part of the record in this case for the purpose of determining this appeal, should this petition for certiorari be granted.

Reasons for Granting the Writ.

I AND II.

Justice William O. Douglas wrote the following for publication in 1960:

> "There is no crime known as 'suspicion' nor is there any federal crime known as 'holding for investigation.' Yet it is common in the District of Columbia, to make arrests for the latter purpose. There were 7,367 persons so arrested in 1958, *all of whom were later released.*" "Vagrancy & Arrest on Suspicion," 70 Yale L.J. 1, 12 (1960).

It is evident from Justice Douglas's article that this practice is not limited to the District of Columbia. Across the United States hundreds of people are arrested "on suspicion" every day in order that they may be investigated further. The District Court of New Orleans acknowledged the practice of its local police department in arresting persons "on suspicion" in an opinion in 1958.

> "It is true that it had formerly been the practice of the New Orleans Police to book suspects on a charge of vagrancy pending investigation of other offenses. It is also true that this practice has been discontinued through the efforts of the Criminal Bar Association of the City of New Orleans." *United States* v. *Sigler*, 162 F. Supp. 256, 259 (1958).

Unfortunately the practice has been discontinued neither in New Orleans nor elsewhere in the United States. The police refuse to discontinue it. They argue that the power to pick up and hold persons for questioning without probable cause to arrest them for a specific crime is a necessary weapon in law enforcement. Justice William O. Douglas disagrees. He says ". . . arrests on suspicion are unconstitutional at the local as well as at the federal level." "Vagrancy and Arrest on Suspicion," 17 Yale L.J. 1, 13 (1960).

Mr. Justice Brandeis dissenting in *Olmstead* v. *United States,* 277 U.S. 438, 72 L. Ed. 944, 48 S. Ct. 564 (1928), wrote:

> "Our Government is the potent, the omnipresent teacher. For good or for ill, it teaches the whole people by its example. . . . If the Government becomes a lawbreaker, it breeds contempt for law; it invites every man to become a law unto himself; it invites anarchy." (P. 485.) Mr. Justice Clark agreed in *Mapp* v. *Ohio,* 367 U.S. 643, 6 L. Ed. 2d 1081, 81 S. Ct. 1684 (1961): "Nothing can destroy a government more quickly than its failure to observe its own laws . . ." (P. 659.)

The law here is clear. The Supreme Court has forbidden such restraints, except in conformity with the Fourth Amendment requirement of probable cause. *Henry* v. *United States,* 361 U.S. 98, 4 L. Ed. 2d 134, 80 S. Ct. 168 (1959). *Brinegar* v. *United States,* 338 U.S. 160, 93 L. Ed. 1879, 69 S. Ct. 1302 (1949). *Carroll* v. *United States,* 267 U.S. 132, 69 L. Ed. 543, 45 S. Ct. 280 (1925). However, in *Rios* v. *United States,* 364 U.S. 253, 4 L. Ed. 2d 1688, 80 S. Ct. 1431 (1960), the government urged that the Court give explicit recognition to the right of police to stop and

question suspects, without their consent, in the absence of grounds for an arrest. The Court disposed of the case on other grounds.

The *Rios* question is before the Court again in this case, and doubtless, if it is not decided now, it will be a recurrent visitor in the light of the statistics of Mr. Justice Douglas, *supra*. Therefore your petitioner prays that this petition for a writ of certiorari be granted.

III.

In 1964, Mr. Justice Goldberg wrote:

> "We hold, therefore, that where, as here, the investigation is no longer a general inquiry into an unsolved crime but has begun to focus on a particular suspect, the suspect has been taken into police custody, the police carry out a process of interrogations that lends itself to eliciting incriminating statements, the suspect has requested and been denied an opportunity to consult with his lawyer, and the police have not effectively warned him of his absolute constitutional right to remain silent, the accused has been denied 'the Assistance of Counsel' in violation of the Sixth Amendment to the Constitution as 'made obligatory upon the States by the Fourteenth Amendment,' *Gideon* v. *Wainwright* . . ." *Escobedo* v. *Illinois*, 378 U.S. 478, at pp. 490-491, 12 L. Ed. 2d 977, 84 S. Ct. 1758 (1964).

In the case at bar the defendant had been arrested on suspicion of murder and charged with vagrancy. The investigation had clearly focused on him and he was placed in an interrogation room and questioned by the police. He requested and was denied counsel and was never warned of his absolute constitutional right to remain silent. There-

fore under the holding in *Escobedo* v. *Illinois, supra,* the defendant was clearly denied his right of counsel.

But what can a person do when counsel is denied? *Escobedo* v. *Illinois, supra,* only decided that the police could not use in court any evidence procured in this manner. The question to be answered now is: After counsel is denied, does the defendant have to submit to any further demands by the police, especially the removal of his clothing and the inspection of his skin? Does the denial of counsel vitiate the arrest itself? A holding that it does is the logical next step from *Escobedo* v. *Illinois,* and your petitioner prays that this Court grant certiorari and take that step.

IV.

Whether the removal of the defendant's clothing and the examination of his skin in order to determine his identity was an unreasonable search depends on whether "probable cause" existed at the time of the arrest and search. In order to satisfy this burden, the State must prove that the officers had probable cause to believe both that Johnny McTaylor was a murderer and that the defendant was Johnny McTaylor. No evidence was ever introduced as to the probable cause to believe Johnny McTaylor to be a murderer. Furthermore, the reasons why the police thought the defendant to be Johnny McTaylor are insufficient to make out probable cause.

> "To afford a justification, there must be not only a real belief, and reasonable grounds, for it . . . but, where there is an opportunity for inquiry and investigation, inquiry and investigation should be made. . . . [The officer] was bound to use all reasonable means to avoid possible mistake, and the arrest of an innocent

> man. . . . He was not justified in relying upon a personal resemblance, as indicated by a comparison with a photograph . . . especially as there was, within easy reach, means of identification." *Filer* v. *Smith,* 96 Mich. 347, 354, 55 N.W. 999, 1001, 1002 (1893).

This means of identification, within easy reach, was the telephone. But the police refused to let the defendant use it to call his lawyer and prove his identity. Neither did they use it themselves. Instead of making a reasonable investigation, the police chose instead to determine whether or not the defendant was Johnny McTaylor by the simple expedient of ripping off his clothes. Police tactics such as these are a recognized part of big-city law enforcement, although such tactics are never openly approved. Nevertheless, the State courts have condoned them by accepting their fruits and relegating their victims to a civil action against the offending officers later on.

This Court recognized the plight of these victims in *Wolf* v. *Colorado,* 338 U.S. 25, 93 L. Ed. 1782, 69 S. Ct. 1359 (1949). It slowed the practice in *Rochin* v. *California,* 342 U.S. 165, 96 L. Ed. 183, 72 S. Ct. 205 (1952). And in *Mapp* v. *Ohio, supra,* it effectively stopped the use of the fruits of an illegal search in court. Now the Court is asked to clarify what a person can do when the police try to force him to submit to an illegal search. Therefore your petitioner prays that this Court grant certiorari, make a clear and definite ruling, and stem these abuses.

V.

In *Garner* v. *Louisiana,* 368 U.S. 157, 7 L. Ed. 2d 207, 82 S. Ct. 248 (1961), the Court held that it was a denial of due process for the defendant to be convicted of disturbing the peace where there was a total lack of evidence of the

commission of the crime. In the case at bar there is the same total lack of evidence. The officers testified that the defendant never struck out at them but that he merely held on to his clothing. In fact, the officers never felt they had even been assaulted on October 13, 1964. It was not until May 14, 1965, after they had conferred with Judge Bucaro and the prosecuting attorney, in open court, that the officers decided that they had been assaulted back on October 13, 1964. It was not until May 14, 1965, that any complaints for assault were ever brought against the defendant.

The lengths to which Judge Bucaro has gone to protect the officers involved in this case, and to keep this case from being heard in full, are a credit to his determination to be re-elected to the Municipal Court judgeship which he now holds. He continued the case without cause four times, from December 4, 1964, to July 16, 1965, and succeeded in having the case split in half so that any appeal would of necessity be only piecemeal. He has still refused to decide the first half of the case, involving the charges of vagrancy, reviling the police and resisting arrest, thus effectively preventing that half of the case from either being appealed or its transcript being used as evidence. In short, Judge Bucaro has denied the defendant any semblance of a speedy and impartial trial.

New Orleans is a city where the people truly fear the police, and where the police department is all powerful. The defendant went against this untrammelled New Orleans police power on the street and was arrested. He stood up against it again in the police station, and was choked, beaten, kneed in the groin and knocked to the floor. He fought it in the opposition's lair in Municipal Court, and lost. He appealed against it in the Criminal District Court and lost again. He sought review of it in the Supreme Court of Louisiana and they looked the other way.

Now the defendant is at the door of the Court of Last Resort.

Now it is with this Court alone to overturn this unfounded conviction; it is with this Court alone to halt the police practice of stopping and questioning persons "on suspicion" without their consent in the absence of probable cause to arrest them.

Conclusion.

For the foregoing reasons this petition for a writ of certiorari should be granted.

Respectfully submitted,

STEPHEN R. WAINWRIGHT,
Pro Se.

[Appendix follows.]

Appendix A.

Statutes.

(See pages 3-4, *supra.*)

Appendix B.

Rulings, Opinions and Judgments below.

Number 189-939 "E"

CRIMINAL DISTRICT COURT FOR THE PARISH OF ORLEANS

STATE OF LOUISIANA

APPLICATION FOR WRITS OF CERTIORARI, PROHIBITION AND MANDAMUS TO THE SECOND MUNICIPAL COURT, CITY OF NEW ORLEANS, STATE OF LOUISIANA, IN THE CASE ENTITLED:

B-80503

CITY OF NEW ORLEANS,
STATE OF LOUISIANA

vs.

STEPHEN R. WAINWRIGHT

Dan A. Spencer
3420 Greenwood Road
Shreveport, Louisiana
Attorney for Stephen R. Wainwright

TO THE HONORABLE THE JUDGES OF THE CRIMINAL DISTRICT COURT OF THE PARISH OF ORLEANS, STATE OF LOUISIANA:

The petition of Stephen Reed Wainwright, defendant in a case entitled "City of New Orleans vs. Stephen Reed Wainwright, No. B-80503 on the Docket of the Second

Municipal Court of the City of New Orleans, respectfully shows:

Statement of the Case

The defendant is charged in three affidavits with violations of municipal ordinances of the City of New Orleans, being ordinances Nos. 828 MCS, Sections 49-2, relative to resisting arrest, 42-85:3, relative to loitering and 49-7, relative to reviling the police. It is alleged in the affidavits that the defendant violated the said ordinances on Tuesday, the 13th day of October, 1964.

On December 4, 1964, the trial of this case was begun and two witnesses were heard. The witnesses testified to the character of the defendant and the fact that he was and had been on the date of the alleged offense a student in the School of Law at Tulane University. Following the testimony of the two character witnesses, the court ordered the trial of this matter continued indefinitely, over the strenuous objection of counsel for defendant. Sometime in the month of April, 1965, subpoenas were issued to the defendant and his attorney ordering the continuance of the trial herein. The trial was set to resume on the 7th day of May, 1965.

At the commencement of the trial a number of witnesses for whom subpoenas had been requested by the defendant were not present in open court. The court refused to issue attachments for these witnesses although it did see fit to sequester the Dean of the Tulane University School of Law, a prospective character witness for the defendant, putting him in a private office, by himself. Following the swearing of one of the city's witnesses, and some testimony by him, the case was thereupon continued to the 14th day of May, 1965, once more over the strenuous objections of counsel for defendant.

During the course of the testimony at the trial on the 7th day of May, 1965, the defendant was forced to stand at attention before the dock and threatened by Judge Andrew Bucaro, the Judge of the said court, with being placed in jail for contempt if he moved.

In continuing the case to the 14th day of May the Judge stated that he was doing so in retaliation for the defendant's having turned around while standing before the dock. He further stated that the fact that counsel for defendant was from Shreveport and would be forced to return again to the City of New Orleans to resume the trial made no difference, as he (the Judge) "understood that the defendant's father was a successful attorney and could afford counsel's fee". He further stated that the fact that the defendant would be in the midst of taking final exams in the Tulane Law School at the time of the trial would make no difference. The case was continued.

Ground on Which the Supervisory Jurisdiction of This Court is Invoked.

Petitioner shows that no appeal lies from the judgments and actions complained of and further shows that he will suffer irrevocable injury as a result of these judgments and actions unless remedial writs are granted by this Honorable Court for the following reasons:

The Issues

This case is a prosecution by the City of New Orleans for the violation of municipal ordinances. The issues and questions of law involved are:

1. Whether the continuance of this case from time to time over a period of five months for the obvious reason of imposing summary punishment on the defendant constitutes a violation of the defendant's constitutional rights

to a fair and impartial and speedy trial and due process of law.

2. Whether the forcing of the defendant, who is partially incapacitated by duodenal ulcers and a back injury, to stand at attention before the dock of the court in such a manner as to impose summary punishment constitutes a violation of his constitutional immunity from cruel and unusual punishments and his right to due process of law and to be presumed innocent until proven guilty.

3. Whether a trial Judge may intimidate a defendant and his counsel with threats to hold the defendant in contempt of court for actions which would not, in the eyes of reasonable men, imply any lack of respect for the court.

4. Whether the defendant may be constitutionally deprived of his right to compulsory process for the attendance of witnesses in his favor.

Assignment of Errors

1. The court erred in continuing the trial for a period of over five months.

2. The court erred in continuing the trial on May 7, 1965, as a means of retaliation against the imagined lack of respect of the defendant for the court.

3. The court erred in continuing the trial on May 7, 1965, as a means of imposing summary punishment on the defendant without due process of law.

4. The court erred in failing to issue instanter subpoenas or attachments for absent witnesses subpoenaed by the defendant.

5. The court erred in forcing the defendant, who is not in good health, to stand at attention before the dock of the court, this being a medieval practice long since discarded by the courts of this country.

6. The court erred in attempting to intimidate defendant and his counsel with threats of jailing defendant for contempt.

Argument on Assignment of Errors

This proceeding in the municipal court in the City of New Orleans constitutes a flagrant and shameful travesty of justice. From the time of defendant's arrest in this case, his rights have been totally ignored. After being brutally and unjustifiably beaten by the New Orleans Police Department, defendant was denied the right to confer with his counsel or obtain medical assistance for a period of several hours. When his attorney attempted to see him shortly after his arrest, the attorney was ordered from the police station, arrested for refusing to leave it without seeing his client, and jailed.

On the evening on which defendant was arraigned in the municipal court, undersigned counsel, the same attorney who was arrested by the police on the previous night, was informed by one Judge of the Municipal Court that in any case before that court in which the complainant was a policeman, there would be a conviction whether the defendant be an attorney, a priest or of impeccable character and despite any testimony of the defendant's innocence. The Judge gave as a reason that he and the other Judges of the Municipal Court could not be re-elected without the support of the New Orleans Police Department and that, consequently, the Judges of that court must, of necessity, support the policemen, whether they were right or wrong. When defendant's attorney went to trial on the charges against him in the Municipal Court, he was asked to attend the chambers of the presiding Judge. He was there given cause to believe that unless he dropped any action he might be contemplating against the policemen involved, he would be convicted. When he refused

to drop the action against the policemen, he was convicted on a record devoid of any evidence of guilt. Attempts were made by the Judge and the City Attorney to prevent him from taking an appeal. Immediately prior to the commencement of that trial, the presiding Judge had been visited in his office by the superintendent of Police, who was a witness in the case, and both the defendant and his associate counsel were denied the right to be present at the conference.

An appeal was ultimately perfected to this Honorable Court, being Case No. 188-368 of Section E of this Court. The Honorable Rudolph F. Becker, Jr. acquitted undersigned counsel of any wrongdoing in that case.

Counsel has been informed by the City Attorney's office that in any case before the Municipal Court, it is the duty of the City Attorney, as much to protect policemen from possible civil actions as it is to obtain convictions of guilty persons.

The foregoing recitation has been provided to give the court the background on this case and the environment in which it has been conducted. This can hardly be said to have been a fair and impartial trial to date.

The errors of the trial Judge set out above constitute, in the opinion of counsel, an attempt to summarily punish the defendant for charges he has made against members of the New Orleans Police Department. The expenses of defense in this case, exclusive of attorney's fees, will nearly exceed the maximum fine which could be imposed upon the defendant should he be found guilty. It would seem that justice in the City of New Orleans places a much higher cost on proving ones' innocence than in pleading guilty to totally unfounded and unwarranted charges, at least in the Municipal Court.

Unless this Honorable Court grants the writs here applied for, the defendant will be further unjustly damaged

in the Municipal Court. He will be forced to stand at attention, possibly for hours, before the dock of the court. He will be forced, while in the midst of his final exams in his last semester of law school to come again and again to the municipal court, there to be unfairly abused with threats of jail for any slight movement. His attorney will be forced, one knows not how many more times, to journey from Shreveport to New Orleans to hear perhaps half the testimony of one witness, if that, on each trip. The defendant could hardly obtain new counsel in the middle of the trial. Defendant will be deprived of his right to obtain witnesses in his favor by the refusal of the trial court to issue subpoenas.

WHEREFORE, petitioner prays that his application for remedial writs be filed in this Honorable Court and that writs of Certiorari, Prohibition and Mandamus issue herein ordering and commanding the Judge of the Second Municipal Court of the City of New Orleans to send forthwith the original records of the above case to this court for reviewing of the judgments and actions of the said Judge of the Second Municipal Court and prohibit the said Judge from proceeding further in this case and the respondent from prosecuting it further until the judgment be pronounced herein on the regularity of these proceedings. That the aforesaid Judge of the Second Municipal Court and the respondent, the City Attorney, be ordered to show cause in this court at a day and hour to be fixed by the court, why the Honorable Andrew Bucaro, Judge of the Second Municipal Court, should not be ordered:

1. To commence immediately and within twenty-four (24) hours the trial of this case and the taking of evidence therein and to proceed from minute to minute and hour to hour until such time as all of the evidenee has been heard and judgment rendered.

2. To cease and desist from having the defendant stand at attention at the dock of the court and to allow him to be seated during the course of the trial.

3. To cease and desist from threatening either defendant, or his counsel, with holding them in contempt unless it should be necessary to do so to maintain order in the court room.

4. To issue instanter subpoenas or attachments for any witnesses for whom subpoenas were requested by defendant or his counsel and who were not present in court at the commencement of the trial.

DAN A. SPENCER
Dan A. Spencer
Attorney for Petitioner
3420 Greenwood Road
Shreveport, Louisiana

CRIMINAL DISTRICT COURT FOR THE PARISH OF ORLEANS

Section.....
Number.....

CITY OF NEW ORLEANS *vs.* STEPHEN R. WAINWRIGHT

In re: Stephen R. Wainwright, applying for writs of Certiorari, Prohibition and Mandamus:

The petition of the realtor in the above entitled and numbered cause, having been duly considered;

It is ordered that a writ of Certiorari issue herein, directing the Honorable Andrew Bucaro, Judge of the Second Municipal Court of the City of New Orleans to transmit to the Criminal District Court for the Parish of Orleans on or before the.....day of....., 1965, the record, or a certified copy of the record, of the proceedings complained of by the realtor herein, to the end that the validity of said proceedings may be ascertained.

It is further ordered that the aforesaid Judge of said court and the respondent, City Attorney of the Municipal Court, show cause, in this court, on the date aforesaid at.....o'clock..... M., why the relief prayed for in the petition of the realtor should not be granted.

It is further ordered that the aforesaid Judge be and he is hereby enjoined from proceeding further in this case until judgment shall be pronounced on the regularity of his proceeding.

Granted at New Orleans, Louisiana,....., 1965.

.....

Judge

STATE OF LOUISIANA;
PARISH OF CADDO:

DAN A. SPENCER, being duly sworn, deposed and said that he is Attorney for the petitioner in the above and foregoing application for remedial Writs of Certiorari, Prohibition and Mandamus; that all of the facts set forth therein are true and correct; that a copy of the application has been mailed to the City Attorney, postage prepaid and a copy has been mailed to the respondent Judge of the Second Municipal Court, Honorable Andrew [Bucaro], postage prepaid.

DAN A. SPENCER
Dan A. Spencer

Sworn to and subscribed before me, this 10th day of May, 1965.

E. E. BLAND JR.
Notary Public

CRIMINAL DISTRICT COURT
PARISH OF ORLEANS
STATE OF LOUISIANA

No. 189-939
SECTION "E"

CITY OF NEW ORLEANS,
STATE OF LOUISIANA
vs.
STEPHEN R. WAINWRIGHT

Application for Writs of Certiorari, Prohibition and Mandamus to the Second Municipal Court, City of New Orleans, State of Louisiana.

Writs refused.

New Orleans, Louisiana, this 13th day of May, 1965.

RUDOLPH F. BECKER, JR.
Rudolph F. Becker, Jr.
Judge, Section "E"
Criminal District Court
Parish of Orleans

Clerk's Office May 14 1965
A true copy.
DAN B. HAGGERTY
Deputy Clerk,
Criminal District Court,
Parish of Orleans.

APPEAL TO
CRIMINAL DISTRICT COURT

STATE OF LOUISIANA
CITY OF NEW ORLEANS
v.
STEPHEN R. WAINWRIGHT
DEFENDANT-APPELLANT

APPEAL FROM
FIRST MUNICIPAL COURT
CITY OF NEW ORLEANS
HONORABLE JUDGE ANDREW G. BUCARO

ORIGINAL BRIEF OF DEFENDANT-APPELLANT ON APPEAL

by Dan A. Spencer
Attorney at Law
Attorney for Defendant

MAY IT PLEASE THE COURT: This is an appeal from a conviction of the defendant by the First Municipal Court of the City of New Orleans. The defendant finds it necessary at the outset to object to the record transmitted to this Court from the Municipal Court. The record as transcribed is inaccurate and incomplete. It omits certain questions and the answers thereto by the witnesses. It is entirely devoid of any of the grounds stated by counsel for the defendant in support of objections and motions made during the course of the trial. The testimony which is omitted is not crucial and if this Honorable Court finds that the defendant can supply here all the legal grounds for objections and motions which are reflected in the record, then the defendant is willing to have his appeal decided on the record as transmitted. If not, the defendant must insist upon his right to an appeal on the entire record of the trial in the lower court. La. R. S. 13:2498

Statement of Case

The defendant is charged with the violation of two ordinances, which for the convenience of the court, will be set out here in full. Section 49-2 of the Code of the City of New Orleans provides:

> "SECTION 49-2. RESISTANCE UNLAWFUL.
>
> It shall be unlawful for any person, by word or action, to resist an officer, or to incite, induce, suggest or otherwise persuade or attempt to persuade any person to resist an officer." (C.C.S., Ord. No. 18, 142, § 2.)

Section 42-24 of the Code of the City of New Orleans provides:

> "SECTION 42-24. DISTURBING PUBLIC PEACE.
>
> No person shall disturb the public peace by assaulting or beating another or by threatening to do bodily harm to another." (C.C.S., Ord. No. 7637, § 1.; Ord. No. 7809, § 1.)

Two police officers testified on behalf of the City. They testified that while on duty at the First District Police Station on the night of October 13, 1964, the presence of the defendant, Mr. Wainwright, was brought to their attention and that they *were told by other officers* that Mr. Wainwright had been arrested. Neither of them disclosed what charges, if any, had been made against Mr. Wainwright.

Lt. Martello, the police officer who had been in command at the police station, testified that he ordered the defendant to take off his jacket so that he could search him and determine what, if any, identifying marks Mr. Wainwright had on his body. He testified that, when Mr. Wainwright refused to take his jacket off, he ordered several other

police officers to take it off of him. Martello stated that the defendant's only action while the police officers attempted to remove the jacket was to fold his arms and hold them together. He also testified that the defendant had been interrogated in the police station prior to this incident and, although, he had requested to be allowed to use the telephone, that he was refused this right until after he had had his clothing torn from him.

Patrolman O'Rourke's testimony added nothing to the City's case except that the defendant had, while they were attempting to remove his jacket, attempted to pull away from them, and they were bounced about some. At the conclusion of these officers' testimony, the defendant made a motion for a directed verdict, which was denied. Mr. Wainwright, who had graduated from Tulane University Law School since the incident and who had come from his home in Massachusetts for this trial, was convicted on all counts.

Assignment of Error

The defendant assigns the following as error on the part of the trial judge in his judgment of the case:

1.

Section 49-2 of the Code of the City of New Orleans is unconstitutional in that it is so vague as not to apprise a person of the prohibited conduct.

2.

There is absolutely no evidence of all of the elements of the offenses of resisting an officer.

3.

There is no evidence whatsoever of the defendant having assaulted a police officer.

Argument on Assignment of Error

Section 49-2 of the Code of the City of New Orleans is unconstitutionally vague. This section of the City Code, standing alone, apprises no one of just what conduct is prohibited. What kind of officer does it refer to and to whom resistance is made unlawful? Is it any public officer, any corporate officer, or any military officer? When is resistance to this officer unlawful? When the officer is acting in his official capacity, at any time, and even when the officer is exceeding his authority? This ordinance could be construed so broadly that any dispute with a public official could subject one to conviction of the crime. As an attorney of law, the writer is an officer of this court. Resistance to him could even be construed as criminal conduct under this ordinance. Under the Jurisprudence of this State as it is set out in the cases of State v. Cristine, 239 La. 259, 118 So. 2d 403; State v. Truby, 211 La. 178, 29 So. 2d 758; and State v. Gardner, 151 La. 874, 92 So. 368, this ordinance must be held unconstitutionally vague. In the latter case, the Court quoted with approval the following words from U.S. v. Reese, 92 U.S. 214, 23 L. Ed. 563;

> "Every man should be able to know with certainty when he is committing a crime. It would certainly be dangerous if the legislature could set a net large enough to catch all possible offenders, and leave it to the courts to step inside and say who could be rightfully detained and who should be set at large."

The Supreme Court must surely have had a law of the type the court here faces in mind when making that statement.

Section 49-1 of the Code of the City of New Orleans contains a definition of the crime of resisting an officer. It is no part of the record of this case, it is not cited in the affidavit against the defendant, and when counsel for the

defendant argued on his motion for a directed verdict, that the conduct of the defendant did not meet that definition, his motion was overruled by the trial judge. No reason was given. I must therefore assume that the city agrees that it is not before this court, and that it does not rely on that section as forming any part of the case against the defendant.

There is however, no way to be sure of this and for this reason the defense must now reurge contentions made below, that the defendant's conduct did not come within the definition in Section 49-1. Section 49-1 of the Code of the City of New Orleans provides:

> "SECTION 49-1. WHAT CONSTITUTES RESISTING AN OFFICER.
>
> Resisting an officer is the intentional opposition, resistence to, or obstruction of, an individual acting in his official capacity and authorized by law to make lawful arrest or seizure of property or to serve any lawful process or court order, when the offender knows or has reason to know that the person arresting, seizing property or serving process is acting in his official capacity." (C.C.S., Ord. No. 18, 142, § 1.)

There is no evidence, and there has been no contention by the City, that Officers Martello and O'Rourke were arresting the defendant, seizing his property, or serving any lawful process or court order. A person can be guilty of the crime defined in Section 49-1 only when he resists an officer *in the process of making a lawful arrest, seizure of property or service of any lawful process or court order.* Criminal statutes are construed strictly and all ambiguities therein should be construed in the accused's favor, State v. Christine, Supra, and authorities cited therein.

If there is one single thing clear in the record of this case it is that the defendant was not being arrested by Officers Martello or O'Rourke, and this being the case Section 49-1 would not cover the conduct of the defendant. The prosecution witnesses stated only that they were told that the defendant *had been* arrested. Nowhere in the record, prior to defendant's motion for a directed verdict, is there any competent or legal evidence that the defendant had been arrested, and there is not even a suggestion that he was being arrested *at the time of the alleged resistance.* Neither is there any evidence of probable cause for him to have been arrested. Under the strict interpretation which must be given a criminal statute, the City must be found to have failed to meet the burden of proving every element of the offense of resisting an officer, if, contrary to our contention Section 49-1 can be considered by this Court as forming part of the charge against the defendant.

The only laws of this State, or of the City of New Orleans, which might apply to resistance to an officer having custody of a prisoner, are those having to do with escape, and those include as a necessary element of the crime, that the accused be in the "lawful custody" of the State. The conduct of a prisoner in police custody is governed by the administrative rules and regulations of the authority which holds him. State v. Daniels, 326 La. 998, 109 So. 2d 896, at page 906.

There is nothing in the record to show that the defendant was in the legal custody of the New Orleans Police Department. There is only the testimony of the police officers that they were told that the defendant had been arrested. The legality of the arrest must be shown in order to find the defendant guilty of any crime in resisting it. Wright v. State of Georgia, 183 S. Ct. 1240, 373 U.S. 284, 10 L. Ed. 349; Cit of Monroe v. Ducas, 203 La. 974, 14 So. 2d 781. One may always resist an illegal arrest

and may use such force as may be necessary, Wright v. State of Georgia, Supra, and City of Monroe v. Ducas, Supra. It is respectfully submitted that even if the City had shown that the defendant had been legally arrested, that the ordinance in question would be inapplicable to the facts of this case since the ordinance prohibits only resistance *during* the arrest and does not apply to the action of a prisoner of the police who is being detained for interrogation or confinement. To hold otherwise is to extend the ordinance to a situation not clearly covered by it.

It is further submitted that the City offered no competent evidence that the defendant *was ever legally arrested* and the existence of a *legal* arrest would be a necessary element of the crime in question which would have to be proved like every other element of a crime. City of Monroe v. Ducas, Supra; Wright v. State of Georgia, Supra. If the defendant had, in fact, been legally arrested it was incumbent on the City to show this, and, the evidence being solely under its control, the City's failure to produce it must be construed against it.

There is the additional factor of the police refusal to allow the defendant to contact his attorney. This was a clear violation of Louisiana Law. It rendered the continued detention of the prisoner illegal, if it was not from it's inception. Does one held incommunicado have an obligation to cooperate with the police? I contend that he does not and that this violation of his constitutional and statutory right gave the defendant the same right of resistance one has to an unlawful arrest. City of Monroe v. Ducas, Supra.

The conviction of the defendant on the charges of assaulting two police officers, is, to say the least, preposterous. If this Court construes the testimony of the two police officers in the light most favorable to the City, it can only find that the defendant tried to hold his arms

together and was yanked from side to side by the police officers. Officer Martello admitted that the defendant did not strike out at the officers, and onl tried to hold his jacket on. This is not an assault. There is no evidence at all indicating an attempt by the defendant to harm these officers. Resistance of the type attributed to the defendant surely does not constitute the crime of assault.

This case forms part of a seemingly interminable series of attempts by certain officials of the City of New Orleans to whitewash the acts of two members of the New Orleans Police Force. Twice before, the facts out of which this case grew have been before this Court.

In City of New Orleans, v. Dan A. Spencer, case no. 188,368 on the docket of this Court, your Honors were presented with the appeal of this defendant's attorney, the undersigned writer, from his conviction for having attempted to contact Mr. Wainwright on the night of his alleged arrest. The charges in that case were for refusal to leave the police station without being allowed to see his client and for reviling the two police officers who refused to allow him to see his client. The record in that case amply demonstrates the devious and contemptible manner in which some public officials in this City would use the judicial process to effect their own ends. The judgment of the Court, the Honorable Rudolph F. Becker, Jr. presiding, was that the defendant had violated no law and had been within his rights in being present at the police station, and that there was no evidence of his having reviled any police officer.

Chapter two of this shameful travesty can be found in case no. 189,939 on the docket of this Court. In that case Stephen R. Wainwright, the defendant herein, was faced with other charges growing out of the same incident. That case was before this Court on an application for writs by the defendant, wherein he sought to have the Second Mu-

nicipal Court, the *Honorable Andrew G. Bucaro* presiding, ordered to continue with the trial of the case. The case had been continued on a number of occasions over a period of five months, being partially tried at each setting. In that case Wainwright was charged with *vagrancy,* resisting arrest, and reviling the police on the night of *October 13, 1964.* The writs were refused in that case. Since the refusal of the writs further testimony has been taken and although the defendant traveled seventeen hundred (1700) miles from his home in Massachusetts, where he was preparing to take the Massachusetts Bar Examination, the case has once again been indefinitely continued, Judge Bucaro refusing to continue further.

It is interesting to note in this connection that it was shortly after the application for writs in that case, in May of this year, that the new charges which are before the Court here were instituted against the defendant. Specifically, these charges against the defendant were filed on May 13, 1965, for the alleged crimes which took place on October 13, 1964.

Counsel for the defendant, several times during the trial of this case requested to be allowed to introduce the entire record in the other case against the defendant, into evidence in this case. This is just one of the omissions in the record hereinabove referred to. This case has dragged on for so long that the defendant only wishes to see it concluded. Counsel feels that the record in this case adequately demonstrates the defendants innocence and therefore will rely on the record of the facts as transmitted, supplying in this brief the legal ground on which he relies.

Conclusion

The only just one would be a judgment of acquittal.

by DAN A. SPENCER
Attorney for Defendant

CITY OF NEW ORLEANS
versus
STEPHEN R. WAINWRIGHT

No. 192-168—SECTION "D"
CRIMINAL DISTRICT COURT
PARISH OF ORLEANS
STATE OF LOUISIANA

APPEAL FROM FIRST MUNICIPAL COURT
CITY OF NEW ORLEANS

JUDGMENT

This is an appeal by the appellant, Stephen R. Wainwright, from the judgment of the First Municipal Court of the City of New Orleans.

The defendant, Stephen R. Wainwright, was convicted in First Municipal Court of violation of Ordinance No. 828 M.C.S. Section 49-2 relative to resisting an officer and violation of Ordinance No. 828 MCC.S. Section 42-24 relative to disturbing the peace. He was found guilty and given a $25.00 fine on each charge which sentences were suspended and the defendant timely filed his appeal.

Counsel for defendant has urged several grounds for reversal of the convictions, which shall be considered, but at the outset this Court is of the opinion that the defendant was under arrest at the time the incidents, which form the basis of these charges, occurred.

The defendant was stopped and questioned by the arresting officers because, in their opinion, he fitted the description of a subject wanted for the crime of murder. The officers had been furnished a composite drawing of the wanted subject and had been requested to search the vicinity of the French Quarter. When the defendant was stopped in the French Quarter he was informed that he fitted the description of the wanted subject and that the wanted subject had a tatoo on his left forearm "born to raise hell". The defendant had no identification on him when he was stopped and he refused to remove his jacket for the purpose of iden-

tification. The defendant was belligerent and attempted to walk off on three different occasions and appeared to be using subterfuge to evade the matter. He refused to answer any questions except his name and that he was a law student. He would not tell his place of birth or give any other information. The officers then arrested him, placed him in a police car and took the defendant to the First District Station.

Under the circumstances, the arrest was legal. Louisiana Revised Statutes 15:60 provides that any peace officer without a warrant may arrest a person:

(3) When a felony has been committed and he has reasonable cause to believe that such person committed it.

"Almost without exception when the fact of felony is known to the police before arrest the courts have found the second prong i.e. the identity of the felon also to have been established. Stated factually, the cases hold that if the police learn from the victim, from their fellow officers, from their own observation at the scene of the crime or from reliable informants that a felony has in fact been committed, the courts require *little more toward identifying the felon to warrant* arrest and search. Bare description, presence near the scene of the felony, suspicious or furtive conduct, any evidence of this nature has been held to constitute probable cause to establish the identity of the felon." (People vs. Estrialgo 37 Misc. (2) 264, 233 N.Y. S 2nd 558.)

Considering all of the facts and circumstances the police were justified and had reasonable cause to arrest the defendant. The Court feels that this entire episode could have been avoided if the defendant had merely revealed his arm, disclosing no tattoo marks and had attempted to be more cooperative.

When the defendant was brought to the First District Station the facts concerning the arrest were brought to the attention of Lieutenant Martello, the superior of the arresting officers.

Lieutenant Martello attempted to question the defendant and he refused any information. Lieutenant Martello asked him to remove his jacket prior to being booked for identification purposes and to reveal any possible concealed weapon. The defendant at this time advised the officer if he wanted the jacket off, he would have to take it off. Lieutenant Martello instructed Officer O'Rourke and Officer Gilford to remove the defendant's jacket. The defendant then folded his arms and crouched and buffeted the officers in their efforts to remove the jacket. The conduct of the defendant was so violent that it was necessary to summon the assistance of a third officer, namely Officer Kent before his jacket could be removed.

The conduct of the defendant at this time was not resisting an officer within the definition and since criminal statutes must be strictly construed, the Court finds the defendant not guilty of resisting an officer. I have been unable to find any authorities as when the resisting arrest must occur. Arrest necessarily involves more than the original physical detention and it could be argued logically that arrest covers the transporting to the station, and booking and fingerprinting but since criminal statutes must be strictly construed in favor of the defendant, I hold that the conduct of the defendant was not, technically, resisting within the wording of the ordinances for the reason that the definition of Resisting an Officer must be read together with the offense of resisting an officer, and one limits the other.

The Chief of Police and the officers, under his direction, have the responsibility of, first, maintaining the security of the District Stations and, secondly, to furnish informa-

tion relative to arrested and suspected persons' name, fingerprints, photographs and identification to the Department of State Police, R.S. 15:581 et sequituir. The defendant was in police custody pursuant to a legal arrest and the officers had the right and the obligation to search the defendant for any concealed weapons, even though the defendant had been previously "frisked" for weapons on the street. This second search before locking up is more detailed because it has to cover not only obvious weapons but anything that may be used as a weapon or means of escape or injury to anyone. It is a matter of common knowledge that belts and ties are always taken from defendants before lockup to protect them as much as anyone else.

For the purpose of identification the police had a right to examine defendant's arm. If perchance the defendant had been the wanted subject and this forceful examination had disclosed his identity, evidence of such an identifying mark could have been testified to. Further, in many jurisdictions the defendant could have been compelled to exhibit his arm at the trial of the matter.

> "Generally, it is not considered to be a violation of the privileges against self incrimination to compel one who is accused or suspected of a crime to perform an act outside the court and not in the presence of the jury and to allow a witness to testify as to the act. This has been explained as arising from the fact that the privilege is intended to protect the defendant as a witness and when such an act is performed outside of court, the evidence thereof comes from witnesses other than the defendant and therefore does not violate his privilege. Furthermore, it has been said that this is as much to exonerate the accused as it is to identify him as the perpetrator of the crime. Thus, a suspect

has been required to try on garments such as a hat or a coat, to put a handkerchief over part of his face, to appear in a police lineup, to submit to a physical examination of his body, to submit to having his fingerprints or footprints taken, to assume certain poses, to be photographed, to speak for voice identification, and to surrender his shoes for the purpose of permitting them to be compared with tracks near the place where the crime was committed.". 21 Am. Jur. 2nd. P. 368.

"Even in a courtroom during a trial a defendant may be required to stand and remove a visor so that witnesses attempting to identify him (or presumptively exonerate him) may have an unobstructed view of his features." People vs. Clark, 18 Cal. 2nd. 448—116 P. 2nd 56.

In People vs. Lopez 384 P. 2nd. 16 the defendant was convicted of murder and objected to being forced to appear in a lineup and appealed. The Court, in denying the appeal, stated:

"Showups are a part of the investigation procedure and often result in the release of a suspect. The showup exposes subjects to view for purposes of identification or elimination but not incrimination." See also State vs. Hughes 154 So. 2nd 395—244 La. 774.

In the instant case the examination of the defendant by the police exonerated him of the charge or suspicion of murder. There is no evidence the police used unnecessary force in removing the defendant's jacket but, on the contrary, the testimony of the officer was to the effect that they tried to avoid being hurt by the defendant or hurting him, but that he bounced them from wall to wall. To hold that the police in circumstances such as this cannot make a

reasonable search and examination of an individual in lawful police custody and that an individual can violently oppose the action of police in doing their duty, would be to unduly hamper the police.

> "The steady increase in the number of serious crimes throughout the United States is a matter of grave concern. Of course the constitutional rights of the individual should be protected. But in our zeal to safeguard those rights we must not be unmindful of the public interest involved and we should not erect any unnecessary barriers that will thwart the law enforcement officers in the performance of their duties to investigate detect and secure evidence of crime."

Hollingsworth vs. U. S. 321 F. 2nd. 342.

In State vs. Hughes 154 So. 2nd 395, 244 La. 774, objection was made to the introduction of photographs of the accused and the testimony of the coroner as to his examination of the accused, which were overruled. In affirming the trial court, the Supreme Court stated:

> "We do not think that permitting the coroner to testify as to his findings upon the physical examination made of the accused or the admission in evidence of pictures of the accused denied him due process of law simply because the examination was made and the pictures were taken while he was in custody of the police and without counsel. We know of no provision of the law which requires the consent of the person arrested and charged with a crime for these things to be done. Neither the testimony of the coroner nor the admission in evidence of the pictures violated defendant's constitutional privileges against compulsory self-incrimination. Underhill's Criminal Evi-

dence (5th ed. 1956) P. 239, sec. 126. State vs. Roy 220 La. 1017, 58 So. 2d. 323. State vs. Robinson 221 La. 19, 58 So. 2nd 408. Counsel does not say that the admission of the testimony and of the pictures was contrary to any rule of evidence or violated any statute or law of this state, and we do not think the facts and circumstances show that any constitutional right of the accused was violated."

Can it be successfully urged that a suspect or defendant cannot be physically forced to appear in a lineup; physically forced to submit to fingerprint and photograph; physically forced to submit to physical examination when the force used is not excessive and only such force is used as is necessary to overcome the resistance of the defendant. I think not. To hold otherwise would thwart the police in their normal investigative procedure.

The judgment of the trial court and the sentence as to the verdict of guilty on the two charges of Disturbing the Peace, is affirmed.

New Orleans, Louisiana, March 2nd, 1966.

/s/ Thos. M. Brahney, Jr.
Thos. M. Brahney, Jr., Judge,
Section "D"
Criminal District Court
Parish of Orleans
State of Louisiana

New Orleans, La., May 16, 1966
A true copy
M. J. Boyle Minute Clerk.
Criminal District Court,
Section "D" Parish of Orleans.

SUPREME COURT OF LOUISIANA

APPLICATION FOR WRITS OF CERTIORARI, PROHIBITION AND MANDAMUS TO CRIMINAL DISTRICT COURT OF THE PARISH OF ORLEANS, STATE OF LOUISIANA, IN THE CASE ENTITLED:

City of New Orleans
State of Louisiana
vs.
Stephen R. Wainwright

#192-168, Section D
Criminal District Court
Parish of Orleans
State of Louisiana

Stephen R. Wainwright, Pro Se
106 Main Street
Brockton, Massachusetts

ASSIGNMENT OF ERROR

The defendant assigns as error on the part of the Criminal District Court of the Parish of Orleans, the following, viz:—

(1) There was insufficient evidence as a matter of law to find that the defendant committed an assault on anyone.

(2) There was insufficient evidence as a matter of law to justify a finding that the defendant committed a breach of the public peace.

(3) The defendant was denied his constitutional right to due process in that:

(a) The defendant was denied his right to have counsel present from the moment of his arrest.

(b) The defendant was deprived of his right not to be subject to unlawful search.

(c) The defendant was deprived of his right to a speedy trial.

(d) The defendant was deprived of his right to an impartial trial.

SUPREME COURT OF LOUISIANA
NEW ORLEANS, 70112

No. 48,108 March 24, 1966

CITY OF NEW ORLEANS
v.
STEPHEN R. WAINWRIGHT

In re: Stephen R. Wainwright applying for writ of certiorari, prohibition and mandamus

The application is denied. The ruling of the Criminal District Court for the Parish of Orleans is correct.

/s/ WBH
/s/ JBF
/s/ JBH
/s/ FWH
/s/ EHMcC
/s/ JWS
/s/ FWS

A true copy
Clerk's Office
Supreme Court of Louisiana
New Orleans
March 24, 1966
HAROLD A. MOISE
Deputy Clerk